BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES A. VEGA Claimant VS. **PANERA BREAD** Respondent AND **CONTINENTAL WESTERN INS. CO.** Insurance Carrier	)	Docket No. 1,037,866

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 18, 2008, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict. Bruce A. Brumley, of Topeka, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) concluded that the evidence showed that Dr. Edward Prostic had a better appreciation of claimant's working conditions than did Dr. E. Bruce Toby. Accordingly, the ALJ found that claimant's work accelerated his tendon ruptures. The ALJ ordered respondent to pay claimant temporary total disability compensation at the rate of $253.35 per week commencing December 7, 2007, until claimant is certified as having reached maximum medical improvement or is released to substantial and gainful employment. The ALJ also ruled that claimant's Exhibit No. 1, the April 4, 2008, report by Dr. Edward Prostic, is not part of the record.[1]

The record on appeal is the same as that considered by the ALJ and consists of the transcripts of the March 12, 2008, and April 16, 2008, Preliminary Hearings and the exhibits, together with the pleadings contained in the administrative file.

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[1] ALJ Order (Apr. 18, 2008) at 1.

ISSUES

Respondent contends the ALJ erred in finding that claimant suffered an injury arising out of and in the course of his employment. Respondent argues that claimant did not meet his burden of proving he suffered a work-related injury. Respondent also asserts the medical opinion of Dr. Toby is more credible than the opinion of Dr. Prostic in this case. Accordingly, respondent requests the Board reverse the Order of the ALJ.

Claimant argues that it is unknown if Dr. Toby was aware of the repetitive nature of claimant's job duties when he changed his mind and stated that claimant's ruptured tendons were not related to his work tasks but were, instead, the result of an old fracture. Claimant contends that Dr. Prostic was aware of claimant's job duties when he opined that claimant's tendon ruptures were made more likely by deformity from an old fracture, but the wear and tear on the tendons was accelerated by his repetitious activities at work. Claimant also argues that the ALJ erred in not admitting Exhibit 1, Dr. Prostic's letter of April 4, 2008, as evidence in the April 16, 2008, preliminary hearing.

The issues for the Board's review are:

(1) Did claimant sustain injury or injuries by accident that arose out of and in the course of his employment with respondent?

(2) Did the ALJ err in not considering claimant's Exhibit 1 to the April 16, 2008, preliminary hearing?

FINDINGS OF FACT

Claimant began working for respondent in early 2006 doing dishes, cleaning the dining area, and bussing tables. He started noticing symptoms in his left hand in September 2007. Before that time, his left hand was symptom free. He believes his condition was caused mostly because of his activities in bussing tables and carrying bus tubs, loading dishes in the dishwasher, loading salad trays in the dishwasher, lifting stacks of dishes, taking out trash, and lifting boxes of soda. He described bus tubs as being a foot and a half long and a foot wide. Customers would put dirty dishes in the bus tubs and he would pick up the bus tubs filled with dishes and take them back to the dish room and load the dishes into the dishwasher. When the dining area was full, he would have to dodge customers and at times lift the bus tubs over customers' heads. This work was fairly constant between 10 a.m. and 3 p.m., as was carrying out trash.

When claimant first noticed his symptoms, he felt a dull aching in his left hand. Then the top of his hand began to fill with fluid. On November 13, 2007, his tendon ruptured, and he felt severe pain, like his hand was being stabbed. This was his last day of work. As of the date of the April 16 preliminary hearing, he stated the pain is on the

backside of his left hand between the wrist and the knuckle of the ring finger. At times, the pain extends past his wrist but never goes as high as his elbow.

This claim was initially accepted as compensable under workers compensation by respondent, and claimant was sent to Dr. Michael Montgomery at Tallgrass Orthopedic Clinic, who referred him to Dr. Toby for treatment. Dr. Toby noted that claimant had a very prominent distal ulna bilaterally and was unable to extend either his little finger or his ring finger on his left hand. Dr. Toby diagnosed claimant with ruptured extensor tendons of his little and ring fingers. A CT scan was ordered which revealed a "[d]eformity of the distal radius consistent with old healed fracture. There is probable chronic radial ulnar subluxation dorsally and mild degenerative radiocarpal changes are present."[2] After review of the CT scan, Dr. Toby informed respondent:

> I have diagnosed Mr. Vega's problem as ruptured extensor tendons of the little finger and ring finger. It is my opinion that this problem is due to an old fracture deformity and subluxation of the distal radius. It is further my opinion that Mr. Vega's problems are not causally related to his employment with Panera Bread and that his employment did not aggravate, accelerate or intensify his condition.[3]

Dr. Toby's medical records on claimant do not indicate that he knew claimant's job duties at respondent.

Upon receipt of this report from Dr. Toby, respondent denied claimant's request for workers compensation benefits. Thereafter, on January 18, 2008, claimant was seen by Dr. Prostic at the request of his attorney. Claimant testified that he could not remember what he told Dr. Prostic about his job duties. Dr. Prostic's report of January 18, 2008, states that claimant's job included bussing tables and washing dishes. Upon examination, Dr. Prostic found that claimant was unable to extend his ring or little fingers on his left hand. He had a significant prominence of the distal ulna dorsally with pronation to 45º on his left wrist. Dr. Prostic found the same prominence of the distal ulna on claimant's right wrist, with pronation to 50º. Dr. Prostic concluded:

> During the course of his employment at Panera Bread [claimant] sustained repetitious minor trauma to his left wrist with rupture of the extensor tendons to the ring and little fingers. He needs to have surgery to take away the prominence of the left distal ulna and do tendon transfers to regain strength to extend the ring and little fingers. He should have prophylactic surgery on the right side performed through his health insurance coverage as that side is currently asymptomatic.[4]

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[2] P.H. Trans. (Mar. 12, 2008), Resp. Ex. A at 3.

[3] *Id.*, Resp. Ex. A at 1.

[4] P.H. Trans. (Apr. 16, 2008), Cl. Ex. 3 at 2.

Claimant's attorney then called Dr. Prostic asking him to explain his comment concerning "repetitious minor trauma." In response to the telephone conversation, Dr. Prostic wrote:

> It is my opinion that the rupture of extensor tendons about [claimant's] right [*sic*] wrist was from repetitious minor trauma during the course of his employment at Panera Bread. The tendon ruptures were made more likely by deformity from an old fracture but the wear and tear on the tendons was accelerated by the repetitious activities at work.[5]

Claimant's attorney took a discovery deposition of Matt Gevedon, an employee of respondent, regarding the job tasks performed by claimant. A copy of the transcript of that discovery deposition was provided to Dr. Prostic. After reviewing the discovery deposition of Mr. Gevedon, Dr. Prostic again wrote claimant's attorney on April 4, 2008. At the preliminary hearing held on April 16, 2008, respondent objected to the introduction of Dr. Prostic's April 4, 2008, letter because it was based on information from a discovery deposition that was not part of the record. The ALJ did not admit the letter as evidence in the case but left the letter in the record as a proffer. Nonetheless, the ALJ found that "[b]y a slight margin the evidence shows that Dr. Prostic has a better appreciation of the claimant's working conditions than does Dr. Toby, and the evidence shows that the claimant's work accelerated the tendon ruptures."[6]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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[5] *Id*., Cl. Ex. 2.

[6] ALJ Order (Apr. 18, 2008).

[7] K.S.A. 2007 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

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[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-555c(a) states in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

ANALYSIS

Claimant has preexisting conditions in both his right and left wrists that predisposed him to the kind of tendon ruptures that occurred on November 13, 2007, at work. The question is whether claimant's job duties made those tendon ruptures more likely or caused them to occur sooner than what would have otherwise occurred absent such work

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[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2007 Supp. 44-555c(k).

activities. In other words, did claimant's work aggravate or accelerate his injuries? In this regard, the record contains the medical opinions of two experts: Dr. Toby says no, it did not, whereas Dr. Prostic says yes, it did.

Both Dr. Toby and Dr. Prostic are orthopedic surgeons. But Dr. Toby is claimant's treating physician, and he specializes in conditions of the hands. Claimant was referred to Dr. Toby by Dr. Montgomery. Dr. Toby was not selected by respondent or its insurance carrier, whereas Dr. Prostic was hired by claimant's counsel to give an opinion on causation. Moreover, Dr. Prostic does not specialize in hand surgery. The ALJ considered Dr. Prostic's opinion to be more credible "by a slight margin" because it appeared that Dr. Prostic may have had a better understanding of claimant's job duties. However, this is not clear from the record. Based on the record presented to date, this Board Member concludes that Dr. Toby's opinion is at least as credible and should be afforded as much weight as Dr. Prostic's opinion. Accordingly, claimant has failed to meet his burden of proving his injury is work related.

On an appeal from a preliminary hearing, the Board can only review the record considered by the ALJ. Whether the ALJ erred by excluding an exhibit offered by claimant is not an issue the Board may decide on an appeal from a preliminary hearing Order. Therefore, the issue of whether the ALJ erred in not considering claimant's Exhibit 1 to the preliminary hearing is dismissed.

CONCLUSION

(1) Claimant has failed to prove that it is more probably true than not true that the tendon ruptures on the two fingers of his left hand were caused, aggravated or accelerated by his work with respondent.

(2) The Board is without jurisdiction to decide whether the ALJ erred in sustaining respondent's objection to the admission of claimant's Exhibit 1.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated April 18, 2008, is reversed as to the award of preliminary benefits but dismissed as to the appeal from the evidentiary ruling.

IT IS SO ORDERED.

Dated this _____ day of July, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge